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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 671

OTHELLO WASHINGTON, RALPH W. McKNIGHT, LORETTA J. WALLACE, CHARLES F. KING, JAMES H. TURNER, *Petitioners,*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF AND APPENDIX IN SUPPORT THEREOF.

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No. 671

OTHELLO WASHINGTON, RALPH W. McKNIGHT, LORETTA J. WALLACE, CHARLES F. KING, JAMES H. TURNER, *Petitioners,*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA. CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, and the appellants below, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on January 15, 1953 (R. 85).

Opinions Below

The United States District Court for the District of Columbia did not render an opinion in this cause. The

opinion of the United States Court of Appeals for the District of Columbia Circuit is set forth on pages 82, 83 and 84 of the record.

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on January 15, 1953 (R. 85). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1). On March 4, 1953 the Chief Justice extended the time for filing certiorari until March 21, 1953 (R. 102).

Questions Presented

1. Whether the search warrant, based upon a police officer's affidavit stating information obtained from an unnamed "reliable informant" and from phone calls made to check the informant's report, was issued upon a sufficient showing of probable cause.

2. Whether petitioners other than Washington, charged with a statutory offense making unlawful the possession of the specific articles seized under a search warrant, have standing to challenge the validity of the warrant under Rule 41(e) of the Federal Rules of Criminal Procedure, notwithstanding they affirmatively made "no claim to ownership or possession of the property seized by police, or to an interest in the premises searched."

3. Whether the testimony of police officers, characterizing articles seized by them as "numbers paraphernalia," is competent as expert testimony in a prosecution for violation of a statute in which the ultimate determination to be made by the jury is the fact of such characterization.

4. Whether the facts of petitioner Washington's presence in and admitted ownership of the premises from which alleged numbers paraphernalia was seized, the search and seizure from his person of a "large sum of money, various papers containing lists of names with

amounts of money alongside and a good many telephone numbers, and adding machine paper containing numbers, names, and amounts of money'' are sufficient in law to constitute a violation of 22 D. C. Code, Sections 1501 and 1502 (1951).

5. Whether the facts of petitioner McKnight's presence in premises from which alleged numbers paraphernalia was seized and the finding in his coat of two adding machine tapes and $40.00 on his person are sufficient in law to constitute a violation of 22 D. C. Code, Section 1501 (1951), particularly in light of his simultaneous acquittal of the charges of violation of 22 D. C. Code, Section 1502 (1951).

6. Whether the facts of petitioner Turner's presence in premises from which alleged numbers paraphernalia was seized and the finding of $50.00 in change in two coats belonging to him and $300.00 on his person, are sufficient in law to constitute a violation of 22 D. C. Code, Section 1501 (1951), particularly in light of his simultaneous acquittal of the charge of violation of 22 D. C. Code, Section 1502 (1951).

7. Whether the fact of petitioners King's and Wallace's presence in premises from which alleged numbers paraphernalia was seized is sufficient in law to constitute a violation of 22 D. C. Code, Section 1501 (1951), particularly in light of their simultaneous acquittal of charges of violation of 22 D. C. Code, Section 1502 (1951).

Statutes and Rule Involved

The pertinent provisions of the District of Columbia Code (1951) are as follows:

> §22-1501. If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery

or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than $1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery.

§22-1502. If any person shall within the District have in his possession, knowingly, any ticket, certificate, bill, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for the purpose of playing, carrying on, or conducting any lottery, or the game or device commonly known as policy lottery or policy, he shall be fined upon conviction of each said offense not more than $500 or be imprisoned for not more than six months, or both.

Rule 41 (e), Federal Rules of Criminal Procedure, provides:

> Motion for Return of Property and to Suppress Evidence.—A person aggrieved by an unlawful search and seizure may move in the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is

insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

Statement of the Facts

On June 4, 1951, a four count indictment was filed against the five petitioners (R. 15-16). The first count charged them with managing, carrying on and promoting a numbers game, in violation of 22 D. C. Code §1501 (1951); and the second charged them with possession of numbers slips, in violation of 22 D. C. Code §1502 (1951). The third and fourth counts charged them with operation of a place for betting on horse races. All of petitioners entered pleas of not guilty (R. 17). Pre-trial motions to quash the search warrant and suppress the evidence seized pursuant thereto were filed on behalf of each of petitioners (R. 18-27) and were summarily denied (R. 28). After a jury trial (R. 29), petitioner Washington was convicted on the first and second counts and was sentenced to imprisonment for a period of 6 to 18 months (R. 32-33). Petitioners McKnight and King were convicted on the first count and sentenced to imprisonment for 5 to 15 months, and 3 to 9 months, respectively (R. 34, 36). The other two petitioners, Wallace and Turner

were convicted on the first count and were given suspended sentences of 4 months to 1 year and 1 day and placed on probation (R. 35, 37).

The proceedings against petitioners began when Arthur H. Molle, Precinct Detective, Vice Squad, Metropolitan Police of the District of Columbia, appeared before United States Commissioner Cyril S. Lawrence on April 11, 1951, and executed affidavits for search warrants for premises 735 and 735-A Rock Creek Church Road, N. W., Washington, D. C. (R. 7, 12). In the affidavits he stated that he had reason to believe that "certain property, namely lottery tickets, lottery policies, or any book, paper memorandum, or device used in setting up, promoting or maintaining a policy lottery" were concealed in the aforesaid premises, in violation of 22 D. C. Code §1501-1502 (1951). In support of these affidavits and as "facts tending to establish the foregoing grounds for issuance of a Search Warrant," he submitted a sworn "Statement of Facts" (R. 8-9), in which he stated: that he had received information, from a source which in the past had proven reliable, that a lottery or numbers were being conducted over telephones TUckerman 4840 and RAndolph 3699; that investigation reveals RAndolph 3699 is listed to Reuben Major of 735 Rock Creek Church Road, N. W., and TUckerman 4840 is listed to the Great Hauling Company, 735-A Rock Creek Church Road, N. W., that his informant disclosed that this address was the numbers headquarters of Othello Washington and Jesse Grear, both of whom are well-known to affiant and other police officers as numbers operators, both having been arrested in the past on such charges; that, on April 2, 1951, he called TUckerman 4840 and asked, "What do you have for the first one?", to which the person answering replied, "2"; that he made similar calls with similar results on April 3, twice on April 4, twice on April 7, and in each instance, sub-

sequent investigation revealed that the number given was the correct number for the day; that his informant had disclosed Othello Washington was known among his friends and associates as "Wash", and on April 5 and again on April 10 he called TUckerman 4840 and asked to speak to "Wash"; that, on each of these occasions he heard the person answering the phone say, "Wash, you're wanted on the phone", and on the first occasion he hung up and did not talk to whoever responded, while on the second occasion he covered the mouthpiece and heard a voice say "hello" 3 or 4 times, then say, "It's gone dead", and hung up; that on April 10 he called the same number about 2 minutes later and asked, "Do you have the first one?" to which the reply was, "We don't have anything yet"; and that all of his calls were made between 3:13 p.m. and 4:15 p.m. (R. 8-9).

On the basis of Officer Molle's affidavits and statement, the Commissioner issued search warrants for the premises 735 and 735-A Rock Creek Church Road, N. W., (R. 10-11, 13-14) on April 11, 1951, the same day the application was made. The returns indicate that the warrants were executed on April 11 at 3:17 p.m., and that the officers seized at 735 Rock Creek Church Road, N. W., 2 telephones (R. 11); and at 735-A Rock Creek Church Road, N. W., a large quantity of numbers slips, 4 adding machines, a radio, scratch sheets, coin wrappers, a large quanity of unused numbers books, other gambling paraphernalia, and about $1,500 in cash (R. 14).

On July 2, 1951, each of the five petitioners filed a "Motion to Quash Search Warrant and to Suppress Evidence" (R. 18-19, 20-21, 22-23, 24-25, 26-27).

Washington's motion alleged (R. 18-19) that on April 11, 1951, the day of the search, seizure and his arrest, he was lawfully possessed of the premises in question; that the premises were illegally and forcibly entered against his will and the entry and his arrest were in violation of his con-

stitutional rights; that the search warrant was insufficient on its face and was improvidentially issued without probable cause; and that the warrant was illegally executed.

The motions filed on behalf of each of the other four petitioners alleged (R. 20-27) that they were lawfully in the premises on April 11, 1951; that they were arrested without probable cause and in violation of their constitutional rights; that the search warrant was insufficient on its face, improvidentially issued and inadequately supported by affidavit; and that the articles seized were seized in violation of their constitutional rights.

On October 2, 1951, these several motions were summarily denied (R. 28, 62). Thereafter, the case was set for trial.

At the commencement of the trial, defense counsel advised the Court that each of the then defendants was, for the record, again raising and renewing each of the motions theretofore made and denied (R. 40). Whereupon, a jury having been empanelled and sworn (R. 29), the prosecution called as its first witness *Arthur H. Molle* (R. 40) a member of the Metropolitan Police Department assigned to the Vice Squad, who testified, over defense counsel's objection (R. 40-41), that he had occasion to secure a search warrant for premises known as 735-735A Rock Creek Church Road, N. W. for the reason that he ". . . had information and evidence that it was a gambling place, and that gambling activity was going on in this premises" (R. 40); that as a result of this information he made telephone calls to telephones which were listed to premises 735 and 735A Rock Creek Church Road (R. 41); over defense counsel's objection (R. 41), that he secured those phone numbers from a "confidential" source of information which had given him similar information in the past which he had found to be valid and trustworthy (R. 41); that he found out one of the phones was listed to the Grear Hauling Company, 735-A Rock Creek Church Road, and the other was

listed to a Reuben Major, 735 Rock Creek Church Road (R. 41); that, about 3:15 p.m. on April 2 he called one of the telephone numbers and a female voice responded (R. 41) and, over defense counsel's objection, when the female voice responded he asked "What do you have for the first one?", to which he received a reply (R. 42); that, thereafter, between April 3 and 11, he made several calls to these two telephones (R. 42-43) and after 3:00 p.m. on April 11, having secured search warrants (R. 10-11, 13-14), in company with several other officers he went to 735-A Rock Creek Church Road, N.W.,—this being the northernmost of two separate entrances in a single duplex building, the other being 735 Rock Creek Church Road, N.W.,—at which address the telephone was listed to the Grear Hauling Company (R. 43-44), rang the doorbell (R. 44), knocked on the door (R. 44), and hearing sounds coming from the second floor, when no one answered he broke the door in and entered a vestibule at the end of which was a second locked door which he was in process of breaking, when a voice called out "Don't break the door, I'll open it", and it was opened by petitioner Washington (R. 45); that, in response to his question, "Where is your office; where is your work?", petitioner made no response, but when Officer Molle saw and tried a second door in front of him which was locked and threatened to force that door open, petitioner Washington said, "The stuff is upstairs" (R. 46). Officer Molle testified further that, without entering either of two locked doors he found on the first floor, he went immediately to the second floor and off of a long corridor in a room to his right just past the steps, the door of which was open, he "found several tables upon which were four adding machines, two telephones, a lot of numbers slips and a lot of money, and all other gambling paraphernalia." Defense counsel's objection at this point was overruled (R. 46). Officer Molle's testimony continued,

that no one was present in that room at that time (R. 47); that after he had been at 735-A Rock Creek Church Road, N. W. about two or three minutes, petitioners McKnight, Turner and Kane [sic] were brought into the room described above (R. 48); that he did not see petitioner Wallace until after he had been in the premises about five to seven minutes (R. 48); that the telephones whose numbers he had received and called were found in the room described above (R. 49); that he searched petitioner Washington about five minutes after entering the premises in the room on the second floor and took from him various pieces of paper, which, over defense counsel's objection, he described in detail (R. 49); that petitioner Washington claimed as his the money—part of which was found on the table in this room and part of which was taken from his person—in the total amount of $1,999.97 (R. 50). Officer Molle then identified Government Exhibit 4, over objection, as "a quantity of numbers slips", "also a quantity of slips on which are written horse bets", "a scratch sheet which was laying on the table of that room on the second floor" (R. 50), "what is commonly called a rundown tape" (R. 51); that petitioner Washington did not indicate whether these articles found on the table in the room on the second floor were his (R. 52); that he also found and identified boxes containing coin wrappers (R. 52) and brown manila envelopes (R. 52). Further, Officer Molle testified that he found in the same room a table model radio (R. 53); which, over objection, he testified that, based upon his experience on the Vice Squad, was used in places set up for gambling activities for the purpose of getting race results which are broadcast from time to time during the day (R. 53). Officer Molle then identified, over objection, various Government Exhibits as having been taken from the premises at the time of the raid, including scratch pads (R. 54), adding machines (R. 54-55), a cardboard

box containing "numbers slips" (R. 55), and paper clips (R. 55). The prosecutor then sought to ask the witness whether all of these articles which he had previously identified "are . . . articles normally used or found in premises set up for the operation of numbers activities and gambling establishments?" (R. 55), to which question defense counsel objected, whereupon the prosecutor stated, "He is testifying as an expert, your Honor, in gambling activities and numbers activities," (R. 56) and was advised by the Court, "If there is any question about the objection, it might be well to qualify the witness as to his experience in the past." (R. 56). Officer Molle then testified that he had observed the method of business or the manner of conducting business for numbers operations as well as horse race parlors on numerous occasions, and that as a result of his observations on these various occasions "articles such as adding machines, paper clips, staplers, envelopes, scratch pads . . . are usually used in the normal course of such a business (R. 57). Officer Molle also testified that three coats were taken from the room on the second floor (R. 57), one of which he subsequently saw petitioner McKnight wearing (R. 57) and from the pocket of which was taken "two rundown tapes" (R. 57); that, from the second coat he took some money (R. 58) and subsequently saw petitioner Turner wearing this coat (R. 58); and that, after finding and taking about $39.00 worth of change from the third coat, he saw subsequently petitioner Turner carrying the coat (R. 59). Officer Molle testified further that during the half hour he was on the premises the telephones rang every fifteen seconds (R. 59-60); that $316.35 was taken from petitioner Turner (R. 60); that $39.12 was taken from petitioner McKnight (R. 60); and that petitioner Washington made no statement to him or in his presence relative to who was in charge of the operation there (R. 61) and "only claimed the money on the

table" (R. 61). Concerning petitioner Wallace, Officer Molle testified (R. 61) that he became aware of her presence after they had been there about fifteen minutes and he had a conversation with her in the room on the second floor; that she denied ever answering the telephones or having any knowledge concerning the fact that a woman answered the telephone when he had called there a "few minutes ago" (R. 61). The prosecution then offered in evidence the several exhibits previously identified by Officer Molle (R. 61), at which point defense counsel objected and, at the bench, moved the Court to reconsider the motion to suppress (R. 62). The Court denied reconsideration of the motion to suppress, overruled petitioners' objections, and received the evidence (R. 63).

On cross-examination, Officer Molle affirmed that he had testified on direct examination that he had received certain information from someone from whom he had received information on prior occasions (R. 63); and testified that he did not recall exactly where he was when he received this information, although it was somewhere in the District and he had talked to this person on various occasions (R. 63). The prosecutor objected to this line of cross-examination on the ground that it was "a devious method to obtain information which he [defense counsel] cannot directly get, and that is the name of the informer" (R. 64). The Court sustained this objection (R. 64) and, further, precluded defense counsel from inquiring into "the surrounding circumstances under which the information was transmitted" (R. 64). Resuming cross-examination of Officer Molle, he testified that his informer never told him he, the informer, had been in premises 735-A (R. 65); that he never knew with whom he talked on the telephone (R. 65); that after they had been issued a warrant and went to Rock Creek Church Road there was no U. S. Marshal with them nor did they attempt to procure a Marshal (R. 65); that he never attempted to have

the source of his information swear to a warrant or an affidavit (R. 65); that he did not know where in the house he was going (R. 65); that they had no arrest warrants (R. 65); that approximately fifteen or twenty seconds elapsed from the time of his arrival on the porch until he broke into the first door (R. 66); that the only thing he saw petitioner Washington do at any time was unlock the second door (R. 66); and that he didn't see any numbers slips on petitioner Washington (R. 66). Officer Molle further testified on cross-examination, that it was in the kitchen—the most extreme room of these premises—in which he saw petitioners Wallace, King, Turner and McKnight, and he did not know of his own personal knowledge where they were when he entered (R. 67). In response to cross-examination as to whether he knew at the time which part of the premises was occupied by either Reuben Major or Jesse Grear, Officer Molle testified that he was satisfied they occupied the entire premises (R. 68) and that he didn't know it was an apartment building when he went there (R. 68). He testified further that on the occasion of the several telephone calls he did not place a bet with anyone (R. 68); that he knew of his own knowledge a lottery was run on the date in question, but he would have to see the paper to tell what track they were being taken from (R. 68); that he gets that information from gamblers (R. 68); that anyone who was interested could listen to the radio and get the number (R. 68); and anyone who was interested could buy an afternoon paper or look at the Bulletin and get the number (R. 68). He was unable to say that there was any consideration passed for any of the pieces of paper which he previously had identified (R. 69) and, upon being shown pieces of paper which he recognized as regulation numbers slips, he did not know when they were placed (R. 69). As a matter of fact, he did not know whether they represented work of the day previous or not (R. 69). He did not observe anyone play

a number or a horse (R. 69). On cross-examination, Officer Molle admitted that he had instructed one of the police officers with him not to let anyone go out of the door and that the two houses were surrounded by police officers (R. 70); that a "rundown tape" represents some past transaction (R. 70); and that neither he nor anyone in his presence asked anyone of petitioners for permission to search their person (R. 71); that no search was made on the first floor other than trying the two doors which he found locked (R. 70); and that he did not personally see any of these petitioners do anything other than the time they were brought into the room where he was (R. 71).

On re-direct examination, Officer Molle testified, over objection by defense counsel, that on the occasion of a telephone call he asked for "Wash" (R. 71) and, although someone answered (R. 71), he didn't know to whom he talked (R. 72).

On recross-examination, Officer Molle testified that slips are very rarely, but occasionally dated (R. 72); and that he had no personal knowledge that any of the slips were played that day (R. 73).

The prosecution then called *Wallace R. Valentine,* who testified that he went up to the rear and up to the second floor porch landing (R. 73); that he saw petitioners McKnight, King and Turner approaching the back door (R. 73); that there came a time when they stopped and walked back into another room, then Sergeant Bonaccorsy opened the back door and he went into and searched the kitchen (R. 73); that in a little room immediately off to the right as one enters through the back door, containing a refrigerator, after opening the door he found petitioner Wallace (R. 73); that in response to his inquiry as to what she was doing in there, petitioner Wallace replied, "I am hiding. I'm scared" (R. 74).

On cross-examination, Officer Valentine admitted that he or anyone else in the group did not know where in the premises they were going (R. 74).

The prosecution then called and examined *Nunzio Bonaccorsy*, who testified, over defense counsel's objection, that when he went in "there" he saw "four adding machines, numerous amounts of numbers slips, scratch sheet, horse bet slips, a numerous amount of change, and bills" (R. 75). He further testified that he first saw the petitioner McKnight back in the kitchen with petitioners Turner and King, "just sitting around" (R. 75); and that he saw petitioner Wallace for the first time when Detective Valentine brought her out of the closet (R. 76); that, in response to questioning by him, petitioner McKnight said that the money taken from him was his and that he didn't have anything to do with the slips that were in the room (R. 76); that petitioner Wallace stated "she didn't have nothing to do with anything; that she was just there visiting" (R. 76); and that he questioned petitioner Turner who said that the money taken from him was his, but that he didn't have anything to do with the slips (R. 76-77).

On cross-examination, Officer Bonaccorsy testified that he had no arrest warrants in his possession (R. 78); that, at his request, petitioner Washington took him into 735 (R. 79); that when he went there he did not know where in the premises the telephone was located (R. 79); that neither he nor to his knowledge, anyone in his company had ever been in these premises before (R. 79); that when he entered the premises and went immediately to the back, some of petitioners were sitting down and others standing, but he didn't see any of them commit any violation of the law at that time (R. 80).

The prosecution rested its case. Defense counsel's motion for judgment of acquittal was denied.

Petitioners stood on their motions and offered no testimony. The jury returned a verdict of guilty on Count 1 as to all petitioners; guilty on Count 2 as to petitioner Washington, only; and not guilty as to all on counts 3 and 4 (R. 32-37).

Reasons Relied upon for Allowance of the Writ

The petitioners assert that a writ of certiorari should be granted in this cause under subdivision 5 of Rule 38 of this Honorable Court, because:

1. The United States Court of Appeals for the District of Columbia circuit in its interpretation and application herein of this Court's decision in the *Brinegar* case has misconceived and unduly extended the doctrine of "probable cause" stated in that case, in violation of rights guaranteed to petitioners under the Fourth and Fifth Amendments to the Constitution of the United States and in probable conflict with applicable decisions of this Court.

2. The United States Court of Appeals for the District of Columbia Circuit, in determining that "Except for Washington, appellants have no standing to challenge the validity of the search warrant because they made 'no claim to ownership or possession of the property seized by police, or to an interest in the premises searched * * *' ", in this case, as in the six other cases cited in the opinion below, has rendered a decision interpreting Rule 41(e) of the Federal Rules of Criminal Procedure which is in probable conflict with applicable decisions of this Court.

3. Similarly, in affirming the trial court's admission of testimony by police officers, as experts, characterizing articles seized by them as "numbers paraphernalia" in a prosecution for violation of a statute in which the ultimate determination to be made by the jury is the fact of such characterization, the Court of Appeals so far sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for

an exercise of this Court's power of supervision and, in addition, rendered a decision in apparent conflict with one of its own subsequent decisions involving the same issue.

4. The decision herein by the United States Court of Appeals for the District of Columbia Circuit, insofar as it affirms the lower court's determination concerning the legal sufficiency of evidence to constitute a violation of 22 D. C. Code, Sections 1501 and 1502 (1951), has decided a question of substance relating to the construction and application of a statute of the United States, which has not been, but should be, settled by this Court.

ARGUMENT AND BRIEF

I. The doctrine of "probable cause" enunciated by this Court in the Brinegar Case is not applicable, or if applicable, was not properly interpreted and applied by the court below in this case.

In *Brinegar* v. *United States*, 338 U. S. 160, this Court enunciated the definition of "probable cause" in the following language (338 U. S. 160, 175-176):

> "The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt." McCarthy v. De Armit, 99 Pa. St. 63, 69, quoted with approval in the Carroll opinion 267 U. S. at 161. And this "means less than evidence which would justify condemnation" or conviction, as Marshall, C. J., said for the Court more than a century ago in Rocke v. United States, 7 Cranch 339, 348. Since Marshall's time, at any rate, it has come to mean more than bare suspicion: *Probable cause exists where "the facts and circumstances within their [the officers] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.* Carroll v. United States, 267 U. S. 132, 162. (Emphasis supplied)

In applying this definition in the instant case, it is submitted that the court below—as did this Court in the *Brinegar* case—must draw the "troublesome line posed by the facts . . . between mere suspicion and probable cause. That line must be drawn by an act of judgment formed in the light of the particular situation and with account taken of all the circumstances."[1] Thus, to the same extent that this Court in the *Brinegar* case meticulously compared and equated the "facts and circumstances" in that case with those in the *Carroll* case, petitioners assert that the proper application of the Brinegar doctrine in this case must depend upon a comparison and equation of the "facts and circumstances" here with those in the *Brinegar* case.

The most obvious distinction between the *Brinegar* case and the instant case—and one which petitioners submit is of primary significance—is the fact that in the *Brinegar* case the issue was *probable cause for an arrest and search without a warrant*, whereas, in the instant case the issue is *probable cause for issuance of a search warrant*. While "probable cause" is common to both issues, and notwithstanding the cases speak indiscriminately of the standard of belief by "a man of reasonable caution",[2] "a man of prudence and caution",[3] "a cautious man",[4] and "a reasonably discreet and prudent man",[5] it is manifestly reasonable to be less critical in evaluating the application of this standard by a layman and its application by a magistrate or other judicial officer. Thus, the constitutional mandate that ". . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . ."[6]

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[1] 338 U. S. 160, 176.

[2] *Carroll* v. *U. S.*, 267 U. S. 132, 162.

[3] *Locke* v. *U. S.*, 7 Cranch, 339.

[4] *Stacy* v. *Emery*, 97 U. S. 642, 645.

[5] *Dumbra* v. *U. S.*, 268 U. S. 435, 441.

[6] U. S. Const. Amend. IV.

has led to decisional language that, "The question as to whether there was probable cause is a judicial question . . .",[7] and "The finding of the legal conclusion or of probable cause from the exhibited facts is a judicial function, and it cannot be delegated by the judge to the accuser."[8] This Court, in *Trupiano* v. *United States*,[9] said:

> "It is cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable. Carroll v. United States, supra, 156; Go-Bart Co. v. United States, supra, 358; Taylor v. United States, 286 U. S. 1, 6; Johnson v. United States, 333 U. S. 10, 14-15. *This rule rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible* and what limitations should be placed upon such activities. United States v. Lefkowitz, supra, 464. In their understandable zeal to ferret out crime and in the excitement of the capture of a suspected person, officers are less likely to possess the detachment and neutrality with which the constitutional rights of the suspect must be viewed. *To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible.* And subsequent history has confirmed the wisdom of that requirement." (Emphasis supplied)

and Mr. Justice Frankfurter, dissenting in *United States* v. *Rabinowitz*, says:[10]

> ". . . The purpose of the Fourth Amendment was to assure that *the existence of probable cause as the*

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[7] *Levee* v. *United States*, 29 F. 2d 187, 188.

[8] *Veeder* v. *U. S.*, 252 F. 414, 418.

[9] *Trupiano* v. *U. S.*, 334 U. S. 699, 704. See also *U. S.* v. *Wallace Co.*, 336 U. S. 793, 798.

[10] 339 U. S. 56, 80.

> *legal basis for making a search was to be determined by a judicial officer . . .*" (Emphasis supplied)

Although the majority opinion by this Court in the *Brinegar* case discussed at some length [11] the "difference between what is required to prove guilt in a criminal case and what is required to show probable cause for arrest or search" and concludes that "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical, they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *The standard of proof is accordingly correlative to what must be proved.*" [12] It is submitted that the footnoted reference to *Grau* v. *United States*,[13] *Giles* v. *United States*,[14] *Wagner* v. *United States*,[15] *Worthington* v. *United States*,[16] and other authorities [17] does not result, as is erroneously assumed by the court below (R. 84), in overruling *Schencks* v. *United States* [18] which held:

> ". . . that affidavits or depositions which simply state that the affiant or deponent has reason to believe and does believe that a crime has been or is in course of being committed, or which go no farther than to allege conclusions of law or of fact, or which set out on mere information and belief the material facts on which the right to search or seize is based, are insufficient to support a search warrant, and any search

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[11] 338 U. S. 160, 172-175.

[12] Id., 175, (Emphasis supplied).

[13] 287 U. S. 124.

[14] 284 Fed. 208.

[15] 8 F. 2d 581.

[16] 166 F. 2d 557.

[17] See 338 U. S. 160, 174-175, footnotes 12 and 13.

[18] 55 App. D. C. 84, 2 F. 2d 185.

warrant issued on such affidavits or depositions is invalid." [19]

At best, what this Court said in the *Brinegar* case is that "the criterion of admissibility in evidence, to prove the accused's guilt" [20] is not requisite for the determination of probable cause, but this Court, with approving reference to the *Carroll* case, said,[21] "The question presented in the Carroll case lay on the border between suspicion and probable cause. But the Court carefully considered that problem and resolved it by concluding that *the facts within the officers' knowledge* when they intercepted the Carroll defendants *amounted to more than mere suspicion* and constituted probable cause for their action." [22]

A second important distinction between the *Brinegar* case and the instant case which, it is submitted, renders doubtful the validity of the application by the court below of the former to the latter, is the absence in this case of the expediency arising from the fact and circumstance that the search in the *Brinegar* case—as in the *Carroll* case—was of an automobile moving on a public highway, rather than of a private dwelling as in the instant case. That this Court attached particular significance to this distinction in the *Carroll* and *Brinegar* cases is apparent from a mere reading of the opinions. Thus, in the *Carroll* case, after reviewing the legislative background and history of the legislation under which the seizure in that case was made, the Court said:[23]

> "The intent of Congress to make a distinction between the necessity for a search warrant in the searching of private dwellings and in that of automobiles and

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[19] Id., p. 187.

[20] 338 U. S. 160, 172.

[21] Id., p. 177.

[22] Emphasis supplied.

[23] 267 U. S. 132, 147.

other road vehicles in the enforcement of the Prohibition Act is thus clearly established by the legislative history of the Stanley Amendment. Is such a distinction consistent with the Fourth Amendment? We think that it is . . ."

and again:[24]

"On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid . . ."

* * * * * * *

"Thus contemporaneously with the adoption of the Fourth Amendment we find in the First Congress, and in the following Second and Fourth Congresses, a difference made as to the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant . . ."[25]

and, summarizing upon the preceding discussion, the Court said.[26]

"We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search

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[24] Id., p. 149.

[25] Id., p. 151.

[26] Id., p. 153.

> of a ship, motor boat, wagon or automobile for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."

That the majority of this Court in the Brinegar case was similarly sensitive to the distinction between considerations involved in a search of a private dwelling and a search of a vehicle moving on a public highway, appears as follows:

> "Obviously the basic facts held to constitute probable cause in the Carroll case were very similar to the basic facts here. In each case the search was of an automobile moving on a public highway . . .[27]
>
> "However, if those standards[28] were to be made applicable in determining probable cause for an arrest or for a search and seizure, *more especially in cases such as this involving moving vehicles used in the commission of crime*, few indeed would be the situations in which an officer charged with protecting the public interest by enforcing the law, could take action toward that end . . ."[29]

and

> ". . . No problem of searching the home or any other place of privacy was presented either in Carroll or here. Both cases involve freedom to use public highways in swiftly moving vehicles for dealing in contraband, and to be unmolested by investigation and search in those movements . . ."[30]

Mr. Justice Burton, in his separate concurring opinion,[31] carries this doctrine of expediency so far as to contend that

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[27] 338 U. S. 160, 165.

[28] Referring to the "rules of evidence" applicable in determining the admissibility of evidence to prove guilt in a criminal case. Id., p. 174.

[29] Id. (emphasis supplied).

[30] Id., pp. 176-177.

[31] 338 U. S. 160, 178-180.

"whether or not the necessary probable cause for a search of the petitioner's car existed *before* the government agents caught up with him and said to him, 'How much liquor have you got in the car this time?' and he replied, 'Not too much,' it is clear . . . that, under all of the circumstances of this case, the necessary probable cause for the search of the petitioner's car *then* existed." [32] And he justifies this position by the following rationalization: [33]

> ". . . It is only by alertness to proper occasions for prompt inquiries and investigations that effective prevention of crime and enforcement of law is possible. Government agents are commissioned to represent the interests of the public in the enforcement of the law and this *requires affirmative action not only when there is reasonable ground for an arrest or probable cause for a search but when there is reasonable ground for an investigation . . .*" (Emphasis supplied)

Mr. Justice Jackson in his dissenting opinion, [34] not only was sensitive to the considerations of expediency which were implicit in the rationale of the majority and concurring opinions, but foresaw the danger which arises from the failure to perceive that distinction—as represented, petitioners submit, by the decision of the court below in the instant case. Thus he said: [35]

> "Undoubtedly the automobile presents peculiar problems for enforcement agencies, is frequently a facility for the perpetration of crime and an aid in the escape of criminals. But if we are to make judicial exceptions to the Fourth Amendment for these reasons, it seems

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[32] Id., p. 178. Cf. *Nueslein* v. *District of Columbia*, 73 App. D. C. 85, 88-89, 115 F. 2d 690.

[33] 338 U. S. 169, 179.

[34] 338 U. S. 160, 180-183, in which Mr. Justice Frankfurter and Mr. Justice Murphy concurred.

[35] Id., p. 183.

to me they should depend somewhat upon the gravity of the offense.

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"The Court sustains this search as an application of Carroll v. United States, 267 U. S. 132. I dissent because I regard it as an extension of the Carroll case, which already has been too much taken by enforcement officers as blanket authority to search cars *on suspicion*. I shall confine this opinion to showing the several ways in which this decision seems to expand the already expansive right to stop and search automobiles." (Emphasis supplied)

In light of the foregoing discussion, petitioners urge that there are such distinctions between the Brinegar case and the instant case as to demonstrate that the court below erred in finding that the Brinegar case is determinative of the issue of probable cause raised herein (R. 83-84). At least in consideration of the fact that the court below has slavishly applied Brinegar to the instant case and other similar cases without apparent rationalization of these distinctions and the implicit limitations of the Brinegar case, petitioners urge the necessity for this Court's review upon certiorari. However, assuming this court is not persuaded that the doctrine of the Brinegar case is not apposite in the instant case, petitioners submit that the court below has misapplied that doctrine herein.

In the Brinegar case this Court meticulously and carefully compared and measured the "facts and circumstances" held to constitute probable cause in the Carroll case as against the "facts and circumstances" with which it was confronted and concluded:

". . . In the absence of any significant difference in the facts, it cannot be that the Fourth Amendment's incidence turns on whether different trial judges drew

general conclusions that the facts are sufficient or insufficient to constitute probable cause.[36]

> ". . . The question presented in the Carroll case lay on the border between suspicion and probable cause. But the Court carefully considered that problem and resolved it by concluding that the facts within the officers' knowledge when they intercepted the Carroll defendants amounted to more than mere suspicion and constituted probable cause for their action. We cannot say this conclusion was wrong, or was so lacking in reason and consistency with the Fourth Amendment's purposes that it should now be overridden. Nor, as we have said, can we find in the present facts any substantial basis for distinguishing this case from the Carroll case . . ."[37]

If, then, the question presented in the Carroll case "lay on the border between suspicion and probable cause" and there is no substantial basis in the facts for distinguishing the Brinegar case from the Carroll case, petitioners respectfully submit that application of the same comparative formula between those cases and the instant case will conclusively demonstrate that the search warrant in the instant case was issued upon mere suspicion, or, possibly what Mr. Justice Burton would characterize as "reasonable ground for an investigation,"[38] but not upon probable cause. For purposes of convenient and graphic comparison we have set out in the Appendix in parallel columns the basic facts held to constitute probable cause in the Carroll, Brinegar and instant cases.[39]

Comparison and analysis of the facts held sufficient to show probable cause in the instant case, in the same manner

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[36] 338 U. S. 160, 171.

[37] Id., pp. 177-178.

[38] Id., p. 179.

[39] Appendix A, pp. ——.

and by the same standards as this Court, in the Brinegar case, analyzed and compared the facts there with those in the Carroll case, is demonstrated as follows:

Brinegar v. United States 338 U. S. 160, 165	Washington, *et al.* v. United States
1. ". . . In each case the search was of an automobile moving on a public highway and was made without a warrant by federal officers charged with enforcing federal statutes outlawing the transportation of intoxicating liquors (except under conditions not complied with).	1. The application was for a warrant to search a *private dwelling*, by a police officer charged with enforcing District of Columbia statutes making illegal the managing, carrying on and promoting a numbers lottery or horse-betting parlor and the possession of numbers lottery (gambling) paraphernalia (R. 7-9, 12).
2. "In each instance the officers were patrolling the highway in discharge of their duty.	2. It is assumed that the police officer here was making routine investigations of gambling activities in discharge of his duties as a member of the Vice Squad, Metropolitan Police Department.
3. "And in each before stopping the car or starting to pursue it they recognized both the driver and the car, from recent personal contact and observation, as having been lately engaged in illicit liquor dealings.	3. The officer had information "from a source which in the past has proved reliable" that these premises were the headquarters of Washington, known as "Wash", and one Grear. However, at no time, prior to application for the warrant and the search did he personally observe either of these persons at or near the premises; nor did his inves-

tigation concerning the telephones disclose that Washington was connected with the premises (R. 8-9); nor did he actually talk with the person summoned to the telephone in response to his request to speak to "Wash" or identify the voice answering as his (R. 9); nor did he observe anything in or about the premises indicating illicit activity other than the inference from the fact that he was able to get correct information concerning the number by calling telephones listed at these premises—although he admitted on cross-examination that anyone interested could listen on the radio or look at a daily newspaper and ascertain the correct number (R. 68)—and knowledge or communication of the number is not per se a violation of the statutes involved. Further, the affidavit does not state how recently or any circumstances concerning the arrest of Washington and Grear on charges leading to the stated conclusion that they "are well known to Molle [the affiant] and other police officers as numbers operators" (R. 8).

Brinegar v. United States 338 U. S. 160, 165	Washington, *et al.* v. United States
4. "Finally, each driver was proceeding in his identified car in a direction from a known source of liquor supply toward a probable illegal market, under circumstances indicating no other probable purpose than to carry on his illegal adventure."	4. Other than the personal observations of the telephone conversations, the affidavit discloses only the "information coming from a source which in the past has proven to be reliable" as the basis for the belief that the premises for which the search warrant was sought were being used to conduct a lottery business (R. 9).

In the Brinegar case, this Court characterized the foregoing as "the ultimate facts" [40] and proceeded to consideration of "the more important variations in details of proof" as follows:

> "In Carroll the agent's knowledge of the primary and ultimate fact that the accused were engaged in liquor running was derived from the defendants' offer to sell liquor to the agents some three months prior to the search, while here that knowledge was derived largely from Malsed's personal observation, reinforced by hearsay; the officers when they bargained for the liquor in Carroll saw the number of the defendants' car whereas no such fact is shown in this record; and in Carroll the Court took judicial notice that Detroit was on the international boundary and an active center for illegal importation of spirituous liquors for distribution into the interior, while in this case the facts that Joplin, Missouri, was a ready source of supply for liquor and Oklahoma a place of likely illegal market were known to the agent Malsed from his personal ob-

[40] 338 U. S. 160, 166.

servation and experience as well as from facts of common knowledge. [41]

The Court attached no significance to the latter two distinctions—the means of identifying the cars and the illegal sources of supply and market. However, in the instant case, insofar as the record discloses, the only basis for identifying the premises searched with reference to illegal activity was the "reliable information" received by the officer, the telephone listings, and the telephone conversations from which he received information which was not itself illegal and, by his own testimony, available to anyone.

The Court held in Brinegar that: [42]

> "The proof therefore concerning the source of supply, the place of probable destination and illegal market, and hence the probability that Brinegar was using the highway for the forbidden transportation, was certainly no less strong than the showing in these respects in the Carroll case."

In the instant case, this probability must be determined, if at all, from the police officer's "reliable information" and from the telephone conversations. He made no personal observation of illegal activity and did not even attempt to place a bet over the telephone (R. 68).

> "Finally, as for the most important potential distinction, namely, that concerning the primary and ultimate fact that petitioner was engaging in liquor running, Malsed's personal observation of Brinegar's recent activities established that he was so engaged quite as effectively as did the agent's prior bargaining with the defendants in the Carroll case. He saw Brinegar loading liquor, in larger quantities than would be normal for personal consumption, into a car or truck in Joplin on

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[41] Id., p. 166-167.

[42] Id., p. 169.

other occasions during the six months prior to the search. He saw the car Brinegar was using in this case in use by him at least once in Joplin within that period and followed it. And several months prior to the search he had arrested Brinegar for unlawful transportation of liquor and this arrest had resulted in an indictment which was pending at the time of this trial. Moreover Malsed instantly recognized Brinegar's Ford coupe and Brinegar as the driver when he passed the parked police car. And at that time Brinegar was moving in a direction from Joplin toward Vinita only a short distance inside Oklahoma from the state line.

"All these facts were undisputed. *Wholly apart from Malsed's knowledge that Brinegar bore the general reputation of being engaged in liquor running,* they constitute positive and convincing evidence that Brinegar was engaged in that activity, no less convincing than the evidence in Carroll that the defendants had offered to sell liquor to the officers. The evidence here is undisputed, is admissible on the issue of probable cause, and clearly establishes that the agent had good ground for believing that Brinegar was engaged regularly throughout the period in illicit liquor running and dealing."[43] (Emphasis supplied.)

By way of contrast, on this "most important" "primary and ultimate fact" that petitioner Washington at the premises searched was engaging in the numbers business, a most careful and favorable examination of the record herein discloses—apart from Molle's knowledge of petitioner Washington's reputation as a numbers operator—nothing but the previously mentioned "reliable information" and the *possibly innocent* and *certainly inconclusive* telephone conversations.

Petitioners respectfully submit that, measured by the facts which this Court in Brinegar and Carroll found sufficient to cross ". . . the line . . . between mere sus-

[43] Id., p. 169-170.

picion and probable cause [which] necessarily must be drawn by an act of judgment formed in the light of the particular situation and with account taken of all the circumstances . . .",[44] the facts upon which the search warrant was issued in the instant case fall far short of being "sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."[45]

II. The decision by the court below, insofar as it determines that the petitioners, except for Washington, have no standing to challenge the validity of the search warrant, is inconsistent with an applicable decision by this Court.

The court below held that, "Except for Washington, appellants have no standing to challenge the validity of the search warrant because they made 'no claim to ownership or possession of the property seized by police, or to an interest in the premises searched. * * * ' ", citing six cases decided by it (R. 83). Previously, the court below had recited that "Evidence seized under a search warrant was admitted at the trial following denial of appellants' timely motion under Rule 41 (e) to suppress this evidence for lack of probable cause to issue a warrant" (R. 83). Petitioners acknowledge that in their several motions (R. 18-27), except for Washington (R. 18), they made "no claim to ownership or possession of the property seized by police, or to an interest in the premises searched," but they question whether, under circumstances such as are here present, this Court's decision in *McDonald* v. *United States*[46] did not give them standing to challege the admissibility of the seized evidence against them.

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[44] Id., p. 176.

[45] Id., p. 175-176.

[46] 335 U. S. 451.

In the *McDonald* case, one Washington, as the petitioners here, was present in the premises searched and from which the seizure was made. As the petitioners here, McDonald and Washington were jointly tried in the United States District Court for the District of Columbia on an indictment in four counts, charging the same offenses as are here involved in violation of 22 D. C. Code, §§ 1501, 1502 (1940). Upon deciding that McDonald's motion for suppression of evidence and the return of the property to him should have been granted, Mr. Justice Douglas, for the majority of the Court, said:[47]

> ". . . It was, however, denied and the unlawfully seized evidence was used not only against McDonald but against Washington as well, the two being tried jointly. Apart from this evidence there seems to have been little or none against Washington.[48] Even though we assume, without deciding, that Washington, who was a guest of McDonald, had no right of privacy that was broken when the officers search McDonald's room without a warrant, *we think that the denial of McDonald's motion was error that was prejudicial to Washington as well.* In this case, unlike Agnello v. United States, supra, p. 35, the unlawfully seized materials were the basis of evidence used against the co-defendant. If the property had been returned to McDonald, it would not have been available for use at the trial . . ." (Emphasis supplied).

Mr. Justice Rutledge, in a separate concurring opinion, goes even further, saying:[49]

> ". . . With respect to the petitioner Washington he is of the view that the evidence, having been illegally

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[47] Id., 456.

[48] In the instant case, petitioners submit that apart from the seized evidence there was *absolutely none* that was competent or conclusive against any of petitioners, including Washington.

[49] 335 U. S. 451, 457.

> obtained, was inadmissible. Cf. Malinski v. New York, 324 U. S. 401, opinion dissenting in part p. 420 at pp. 430-432."

and Mr. Justice Jackson, also in a separate concurring opinion in which he is joined by Mr. Justice Frankfurter, says: [50]

> "As to defendant Washington: He was a guest on the premises. He could have no immunity from spying and listening by those rightfully in the house. But even a guest may expect the shelter of the rooftree he is under against criminal intrusion. I should reverse as to both defendants."

Examination of the cases decided by this Court since the *McDonald* case indicates that the one suggestion that it has been overruled arises from the warning to the majority by Mr. Justice Frankfurter in his dissenting opinion in *United States* v. *Rabinowitz*,[51] that "In overruling Trupiano we overrule the underlying principle of a whole series of recent cases: *United States* v. *Di Re*, 332 U. S. 581; *Johnson* v. *United States*, 333 U. S. 10; *McDonald* v. *United States*, 335 U. S. 451, based on the earlier cases" [52] (Emphasis supplied). However, the point involved was not that in support of which the McDonald case is here cited. Consequently, petitioners submit that the above-quoted language in the *McDonald* case is opposite to the situation of the petitioners here with the same force and effect as it was applied to Washington there.

Petitioners have noted and assume from the fact that the court below cites no decision of this Court in support of its qualification upon the right of a defendant to challenge the

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[50] Id., p. 461.

[51] 339 U. S. 56.

[52] Id., p. 85.

admissibility against him of evidence alleged to have been illegally seized when he asserts no claim to ownership or possession of the property seized by police, or to an interest in the premises searched, as indicating that it finds none. Moreover, petitioners' examination of the six cases previously decided by the court below and cited, it is assumed, in support of the holding in this case (R. 83, footnote 2) suggests that the court below has over-developed the doctrine of "lifting oneself by one's own boot-straps" and is endeavoring to "lift itself by its own boot-straps—without the boots," because in three of the cases cited [53] the point involved here apparently was neither raised, considered nor decided. And, while the opinion in *Gorland* v. *United States* [54] states that: [55]

> ". . . the motion to quash the search warrant did not meet the requirements of Rule 41(e) of the Federal Rules of Civil Procedure, 18 U. S. C. A. Appellant made no claim to ownership or possession of the property seized by police, or to an interest in the premises searched, and has no standing to contest the seizure. See Harvey v. U. S. (Mann v. United States), D. C. Cir., 1952, 193 F. 2d 928."

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[53] *De Bruhl* v. *United States*, — U.S. App. D.C. —, 199 F. 2d 175; *Mills* v. *United States*, — U.S. App. D.C. —, 196 F. 2d 600; and *Whyche* v. *United States*, — U.S. App. D.C. —, 193 F. 2d 703. In court's opinion in the *Whyche case* (at p. 704), the following appears: ". . . the record discloses that counsel not only disclaimed any desire to enter a motion to suppress the evidence, but he also gave specific reasons for his disclaimer. He stated that a motion to suppress evidence would require a claim to a property right in the things seized, and asserted that he was making no such claim. . . . For present counsel to suggest that this Court ascribe a meaning to trial counsel's conduct which was specifically denied by that counsel is to ask that the court substitute its judgment of proper trial tactics for that of the lawyer in the forum. This Court has refused to make such substitution. . . ." The other case cited, *Scoggins* v. *United States* (Decided Jan. 15, 1953), — U.S. App. D.C. —, — F. 2d —, was not available for examination.

[54] — U.S. App. D.C. —, 197 F. 2d 685.

[55] Id., p. 686.

examination of the *Harvey* case reveals the following as the apparent basis for the rule: [56]

> "However, in our opinion, there is an underlying reason why appellants were not entitled to exclusion of the evidence. They never claimed that it was seized by the police, or that they owned or possessed it. On the contrary, at the trial they denied possession or seizure of the articles. They sought to have the court and jury believe that they were victims of a "frame-up" by the police. Under these circumstances we think they now have no standing here to contest their convictions on the basis of a seizure which they originally denied."

for which holding the court below cites no authority and from which the court below apparently would have us infer that a specific and express denial that there even was a seizure is indistinguishable from and authority requiring an affirmative claim of ownership or possession of the property seized or an interest in the premises searched.

Although the fact that this Court denied certiorari in the Wyche [57] and Harvey [58] cases is not to be taken as an indication that this Court approved the interpretation and application of Rule 41(e) by the court below, petitioners respectfully urge that the foregoing discussion clearly demonstrates (1) that there is uncertainty concerning the effect of the *McDonald* case in relation to the right of defendants to challenge admissibility against them of evidence alleged to be wrongfully seized where they have or assert no claim to ownership or possession of the thing seized or interest in the premises searched; (2) that the rule as stated by the court below apparently is not supported by decisions of this Court, nor by other cited authority; (3) the issue is one

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[56] 193 F. 2d 928.

[57] Cert. denied, 342 U.S. 943.

[58] Cert. denied, 343 U.S. 927.

which affects substantial rights of criminal defendants in this jurisdiction under the Constitution of the United States and the Federal Rules of Criminal Procedure, which has not been but should be decided by this Court.

III. The court below condoned, by its affirmance, error, prejudicially affecting substantial rights of petitioners, committed by the trial court in admitting so-called expert testimony by a police officer concerning the ultimate facts to be determined by the jury.

The petitioners, in the first and second counts of the indictment herein, were charged jointly as "being concerned as owners, agents and clerks, and in other ways, in managing, carrying on and promoting a lottery known as the numbers game" and that they "knowingly had in their possession certain tickets, certificates, bills, slips, tokens, papers and writings, used and to be used, and adapted, devised and designed for the purpose of playing, carrying on and conducting a lottery known as the numbers game (R. 15)." These charges were intended to state violations of 22 D. C. Code §§ 1501 and 1502 (1951).[59]

At petitioners' trial, which was before a jury (R. 29-30), the only evidence introduced by the prosecution calculated to prove these alleged violations was the testimony of the police officers who raided the alleged "numbers headquarters" pursuant to a search warrant and arrested petitioners therein and the various articles seized by these police officers from the premises on the occasion of the raid (R. 40-81).

The raiding and arresting officers specifically denied that a bet had been made with any of petitioners (R. 68), that anyone had been observed playing a number with any of petitioners (R. 69), and that the petitioners were observed

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[59] These statutes are set out in full supra, pp. 4-5.

doing anything illegal (R. 71, 75, 80). Consequently, it is fair to assume that all of petitioners' convictions as to count 1 of the indictment and petitioner Washington's conviction on count 2, were based upon determination, in the language of the indictment, that they had in their possession "tickets, certificates, bills, slips, tokens, papers and writings, used and to be used and adapted, devised and designed for the purpose of playing, carrying on and conducting a lottery known as the numbers game."[60] In such circumstances, it is manifest that the ultimate fact to be determined by the jury is whether the various articles seized in the premises at the time of the raid and arrest of petitioners—and, therefore, assumed to be in their possession—were "tickets, certificates, bills, slips, tokens, papers and writings, used and to be used and adapted, devised and designed for the purpose of playing, carrying on and conducting a lottery known as the numbers game."

Against this background, examination of the record discloses that the trial court, over objection of defense counsel, permitted Officer Molle to testify as follows:[61]

> ". . . In that room [referring to the premises raided], I found several tables upon which were . . . a lot of *numbers slips*, . . . and all other *gambling paraphernalia* . . ." (R. 46).
>
> "[Identifying the contents of an envelope referred to as Government's Exhibit 4 for identification] . . . The contents are a quantity of *numbers slips* . . ." (R. 50).

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[60] Under 22 D.C. Code § 1501, *supra*, p. 4, "possession of any copy or record of any such . . . ticket, certificate, bill, token, or other device shall be prima facie evidence that the possession of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting or advertising a policy lottery, policy shop, or lottery."

[61] The emphasis which follows is supplied.

"[Identifying Government Exhibit 8 for identification.] It contained *numbers slips* . . ." (R. 53).

"[Describing Government Exhibit 14.] . . . Fourteen is a cardboard box which contains some *numbers slips* . . ." (R. 55).

Further, at the trial, the following occurred:

"Q. Officer, I ask you with regard to Government's Exhibits 10, 11, 12, 13, 14 and 15, are the articles which you have identified as being taken from 735-A, and which you have identified each individually; are those articles normally used or found in premises set up for the operation of numbers activities and gambling establishments?

"Mr. Mitchell: Objection, your Honor, to any characterization.

"Mr. Smithson: He is testifying as an expert, your Honor, in gambling activities and numbers activities.

"The Court: If there is any question about the objection, it might be well to qualify the witness as to his experience in the past."

"By Mr. Smithson:

"Q. Officer Molle, I believe you testified that you have observed the method of business or the manner of conducting business for numbers operations as well as horse race parlors; is that correct? A. Yes, sir.

"Q. You testified, I believe, that you have observed them on numerous times; I suppose I should categorize it as numbers operations and horse race operations; is that correct? A. Yes, sir.

"Q. And, for the purpose of the record, would you care to state, if you can, approximately how many places engaged in the operating of numbers lotteries you have observed since 1945, shall we say? A. Over a hundred, I would say.

"Q. And, with reference to the conducting of horse race activities, horse race parlors, how many would you say you have observed over the same period of time? A. Well, horse races exclusively, possibly over twenty-five.

"Q. Now, Officer, as a result of your observations on these various occasions, will you state whether or not articles such as adding machines, paper clips, staplers, envelopes, scratch pads, are articles normally found in the conducting of lotteries and horse race parlors? A. Yes, sir, they are usually used in the normal course of such a business." (R. 55-56).

* * * * * * *

All of the foregoing proceedings at the trial, petitioners respectfully submit, were error, prejudicially affecting petitioners' substantial right to a trial by jury as guaranteed by the Sixth Amendment to the Constitution.

It has been held that the opinion of a witness on the ultimate fact for determination of the jury is properly excluded;[62] and that it is error to permit an expert to give his opinion as to the ultimate fact upon which the jury are to pass.[63]

It is submitted further, that whether the articles identified by Officer Molle, as a so-called expert witness, as being articles normally found in the conducting of lotteries, was not only ultimate fact to be determined by the jury, but invaded the province of the jury in an area wherein expert testimony was not necessary and, by the rule expressly adopted in the District of Columbia, was improper.[64]

It appears also that in a case decided subsequent to its opinion in the instant case,[65] the court below[66] considered *sua sponte* under Rule 52 (b) of the Federal Rules of

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[62] *St. Louis-San Francisco Ry. Co.* v. *Barton*, 18 F. 2d 96, 97.

[63] *Standard Fire Extinguisher Co.* v. *Weltman*, 194 F. 400.

[64] *Kenney* v. *Washington Properties*, 76 U.S. App. D.C. 43, 128 F. 2d 612, 614; *Henkel* v. *Varner*, 78 U.S. App. D.C. 197, 138 F. 2d 934, 935.

[65] *Simmons* v. *United States*, — U.S. App. D.C., — F. 2d —. (Decided March 6, 1953). The opinion is not yet reported, but is included herein as Appendix B, *infra*.

[66] Before Bazelon, Fahy and Washington, Circuit Judges, who decided the instant case; with the court's opinion by Bazelon, Circuit Judge, who also wrote the opinion herein.

Criminal Procedure, "since it affected substantial rights of the appellant,"[67] the very issue raised by petitioners in the instant case, involving the propriety of certain testimony in a numbers case by the same police officer as is here involved.[68] For purpose of emphasis the following excerpt is taken from the opinion below in this latter case:[69]

> ". . . Such error stemmed from defense counsel's renewal of the motion to suppress during the trial. In support of that motion, he was allowed over objection to elicit a mass of testimony before the jury on the issue of probable cause for appellant's arrest—a matter solely for determination by the court. It was in this context that the court on its own initiative elicited the testimony in question before the jury.
>
> "It cannot now be said that the admission of much of this testimony constituted harmless error since it might have been admitted as expert testimony on the patterns of conduct characteristic of a numbers operation. It was not introduced for that purpose and thus not so limited. In any event, some of the testimony, such as the following, would not be admissible before a jury under any circumstances:
>
> > 'The Court [to Detective Molle of the vice squad]: Did the information you got from Krenitsky and Maurer [police officers who kept appellant under surveillance for a period of several days prior to the arrest] fit the pattern which you in your experience knew, if you did know, of numbers operations?
> >
> > 'The Witness: Yes, sir, it did, *it fitted right into* my knowledge of how numbers men operated."

and

> 'The Court [to arresting Officer Valentine]: Had either Krenitsky or Maurer told you prior to your

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[67] Appendix B, pp. 3-4.

[68] Officer Arthur Molle.

[69] Appendix B, pp. 3-5.

going out there that day, what Simmons [appellant] had been doing each day they had him under surveillance?

'The Witness: Yes, sir.

'The Court: What did they tell you?

'The Witness: They told us that he was going to these different addresses—I don't know—I remember there was four or five different addresses that he would go to.

'The Court: The same places each day?

'The Witness: The same places each day * * *. And we knew, I mean within my own knowledge, *I knew that he* [*appellant*] *was participating in the operation of a lottery.*

'The Court: You thought so?

'The Witness: I had reasonable grounds to believe that it was, without evidence.'

"That testimony, particularly the italicized portions, prejudiced appellant by substantially affecting his right to trial by jury. Such opinion evidence trenched upon the jury's duty to determine the ultimate question raised by count one, i.e., whether appellant was operating a numbers game in violation of 22 D.C. Code § 1501. It was for the jury, not for the witnesses, to measure evidence on appellant's conduct against evidence on the pattern of conduct characteristic of a numbers operator and upon that basis to determine guilt or innocence."

Petitioners submit that the basis for application of this rule by the court below is even stronger in the instant case, since (1) the offensive testimony in the instant case was elicited by the Government, over defense counsel's objection, rather than by defense counsel; and (2) the claim of error was specifically submitted to the court below by petitioners, rather than being raised *sua sponte* by the court.

If for no other reason than to permit the court below

to reconsider this question in the instant case in the light of its own later and apparently applicable decision, petitioners urge that this Court ought invoke its supervisory powers herein by granting certiorari.

IV. The evidence herein was clearly insufficient, as a matter of law, to sustain the verdicts and judgments, affirmed by the court below.

Petitioners urge upon this Court that there has been a failure and denial of due process because the type of proof offered to convict does not meet the constitutional requirements.

To illustrate, the proof as to petitioner Washington was as follows: Officer Molle said that he had information from an informer that premises 735 Rock Creek Church Road, Northwest, and 735-A Rock Creek Church Road, Northwest, were being used for gambling operations; that he verified such information by telephoning TUckerman 4840 on April 2, 1951 and an unidentified female voice answered the phone; that he also telephoned this number on April 2, 3, 4, 5, 7, and 11, that he also telephoned RAndolph 3699 on April 11, 1951, approximately two minutes before he raided the aforesaid premises. Upon arrival at the said premises on April 11, 1951, he and his party entered by forcing the outer door and were in the process of forcing the inner door when a voice said "Don't break the door, I'll open it;" that the door was opened by appellant Washington; that he inquired of Washington, where is your office, where is your work? that Washington said nothing; that he threatened to force some more doors and Washington then allegedly stated that "the stuff was upstairs." Officer Molle further testified that he went upstairs and found several tables, upon which were four adding machines, two

telephones and materials which he characterized as number slips and gambling paraphernalia. Officer Molle also said that there was some money on the table, which petitioner Washington stated belonged to him; and that the telephones were constantly ringing.

Viewing the evidence in the light most favorable to the Government, as jury's verdict of guilty requires, it is quite apparent that Washington's possesion of the gambling paraphernalia was constructive at most. The absence of any direct proof renders that certain. Apparently, his possession rested alone upon his presence in the premises where the paraphernalia was found, inasmuch as there is no direct evidence showing that he accepted a bet or even knew what a numbers slip was. While the circumstances here may be sufficient to support a finding that an implied constructive possession of number slips had been established they are not sufficient to warrant a finding of

> "KNOWINGLY HAVING IN HIS POSSESSION A TICKET, CERTIFICATE, BILL, SLIP, TOKEN, PAPER WRITING, OR OTHER DEVICE USED, OR TO BE USED, OR ADAPTED, DEVISED, OR DESIGNED FOR THE PURPOSE OF PLAYING, CARRYING ON, OR CONDUCTING ANY LOTTERY, OR THE GAME OR DEVICE COMMONLY KNOWN AS POLICY LOTTERY OR POLICY."

To reach such a conclusion, it would appear that from his presence in premises 735-A Rock Creek Church Road, Northwest, Washington, D. C., (1) a presumption must be made that he had dominion and control over the premises; (2) that he presumed to know what the slips were and for what purpose the paraphernalia was employed and (3) that he was presumed to be in actual and exclusive control of all of the property found therein.

Thus it appears that three presumptions were employed to find the petitioner Washington guilty. In *United States*

v. *Russo*,[70] in discussing a case involving facts similar to the case at bar, the Court declared:

> ". . . When circumstances alone are relied upon to establish a fact, they must themselves be directly proved, United States v. Ross, 92 U. S. 281, 284, 23 L. Ed. 707. A presumption may not be rested upon another presumption. United States v. Ross, supra, 92 U. S. at page 283, 23 L. Ed. 707; Dahly v. U. S., 8 Cir., 50 F. (2d) 37, 43; Ribaste et al. v. United States, 8 Cir., 44 F. 2nd 21, 23; Gerson v. United States, 8 Cir., 25 F. 2d 49, 60; Brady v. United States, 8 Cir., 24 F. 2d 399, 404. The rule could not be otherwise if the legally permissible effect of circumstantial evidence is to receive due respect. In order to justify a conviction of crime or circumstantial evidence it is necessary that the directly proven circumstances be such as to exclude every reasonable hypothesis but that of guilt. See United States v. Baker, et al., 2 Cir., 50 F. 2d 122, 123; Glass v. United States, 3 Cir., 231 F. 65, 68; Hart v. United States, 3 Cir., 84 F. 799, 808."

In the case at bar, therefore, there is an utter want of any evidence as to the petitioner Washington's knowledge that the property was allegedly number slips and gambling paraphernalia (except for his presence and imputed constructive possession thereof), an inference of his innocence is as readily deductible as is an inference of guilt. It follows therefore that evidence was insufficient to support a conviction on Count II of the indictment. Consequently, the appellant Washington was entitled to a directed verdict of acquittal on Count II of the indictment.

What has been said with respect to the charged violation of 22 D. C. Code § 1502 (1951), applied with equal force to the charged violation of 22 D. C. Code § 1501 (1951). This

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[70] 123 F. 2d 420, 422.

is true because the only evidence present in support of a violation of § 1501 is also utilized to prove a violation of § 1502. The proof as to both violations is inseparable.

However, the proof as to the charged violation of § 1501 consisted of (1) the imputed constructive possession of the alleged numbers slips and other alleged gambling paraphernalia (2) coupled with mere presence (3) plus a presumption springing from this imputed constructive possession of the "contraband" that petitioner Washington was engaged in the operation of a "policy lottery" which is generally and colloquially called the "numbers game."

Without laboring this point further, it is sufficient to say that a presumption may not be rested upon a presumption. *United States* v. *Russo, supra,* and cases there cited. It follows, therefore, that an inference may not be rested upon an inference. Thus it would appear that petitioner Washington now stands convicted by virtue of a strong suspicion and probability.

The error arises in bold relief when, as here, the prosecution rests its entire case on a statutory presumption under 22 D. C. Code, § 1501 (1951), *supra,* and then by artful legerdemain urge that possession be presumed by virtue of mere presence in the premises where the statutorily prohibited goods are found coupled with imputed constructive possession of such premises.

Petitioner Washington contends that an inference of guilt can only be drawn from evidence. For such inference, if drawn, as here, from the presumption of possession, rather than the proof of possession, it is in fact a substitution of trial by jury on inferences for a trial by jury on facts. The petitioner Washington stands imperiled by possession unproved, through the device of an inference erroneously permitted by the court below that he was in possession of the premises by virtue of presence in a place where the so-

called illegal goods were found, and then damned by a statutory presumption of guilt flowing from such possession.

The judicial permission erronesouly extended to the jury in the subject cause allows for a substitution of suspicion and conjecture for facts. This the law forbids. In *In re Rivkin*,[71] the Court said:

> "No trier of a question of facts is permitted to venture a guess, with the hope that it is correct. Facts can only be found on evidence and suspicions, however strong, cannot be substituted therefor. This is the universal rule and only safe rule under which justice can be fairly administered."

Petitioner Washington submits that the court below committed prejudicial error in refusing to grant the petitioner's motion for a judgment of acquittal and respectfully asks this Honorable Court to review by certiorari, the court below's affirmance of his conviction.

The four-count indictment against all of the petitioners included, as the first and second counts, respectively, the charges (1) that petitioners were concerned as owners, agents and clerks and in other ways, in managing, carrying on and promoting a lottery known as the "numbers game," to wit, operating a lottery; and (2) that petitioners "knowingly had in their possession certain tickets, certificates, bills, slips, tokens, papers and writings, used and to be used and adapted, devised and designed for the purpose of playing, carrying on and conducting a lottery known as the "numbers game", to wit, possession of lottery parapherna lia. Under the applicable statutes, the first count charges commission of a felony [72] and the second count charges a misdemeanor.[73] Petitioner Washington was convicted as to both counts.

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[71] 216 F. 218.
[72] 22 D.C. Code § 1501 (1951).
[73] 22 D.C. Code § 1502 (1951).

§ 22-1501, defining the felony of operating a lottery, includes the following:

> ". . . The possession of any copy or record of any such chance, right or interest, of any such ticket, certificate, bill, token or other device shall be prima facie evidence that the possession of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting or advertising a policy lottery, policy shop, or lottery."

As the record discloses, petitioner Washington's conviction on count one, i. e., operating a lottery, was based solely upon the evidence adduced to prove his commission of the misdemeanor, i. e., knowing possession of the lottery paraphernalia. Thus, the identical evidence supporting the misdemeanor conviction was used to support the felony conviction.

It is conceded that proof of knowingly possessing lottery paraphernalia, without more, is sufficient to sustain a conviction under the misdemeanor statute, but it is contended that:

> "The same acts, however, cannot at the same time constitute a felony and a misdemeanor; they cannot coexist as the result of one and the same transaction; the crime must be one or the other, not both or either." [74]

In *Blockenburger* v. *United States*,[75] the Supreme Court discussed at some length the proposition of conviction under two sections of the Harrison Narcotics Act by proof of one act or transaction. In that case, the Court stated: [76]

> "Section 1 of the Narcotic Act creates the offense of selling any of the forbidden drugs except in or from

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[74] 22 C.J.S. 56, par. 6.

[75] 284 U.S. 299.

[76] Id., pp. 303-304.

the original stamped package; and par. 2 creates the offense of selling any of such drugs not in pursuance of a written order of a person to whom the drug is sold. Thus upon the face of the statute, two distinct offenses are created . . .

"EACH * * * of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether EACH * * * provision requires proof of an additional fact which the other does not . . .

"A single act may be an offense against two statutes; and if EACH * * * statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other . . ." (Emphasis supplied.)

The test, as above set forth, prescribes that each statute must require proof of an element in addition to those required in the other. Here, true enough, the misdemeanor statute requires proof of knowing possession, an element not required for proof of the felony. However, the converse is not true. The felony statute does not require proof of any fact in addition to those necessary to prove the misdemeanor. Accordingly; the test being whether EACH statute requires proof of a fact in addition to those required under the other [77] and it being obvious that "EACH" means "everyone of two or more," or "all, considered one by one," the fact that § 22-1501 requires less, but not different or additional and it being obvious that "EACH" means "everyone of two or more", or "all, considered one by one", the fact that § 22-1501 requires less, but *not different or additional* proof than is required under § 22-1502 does not satisfy the prescribed test.

[77] See *Gavieres* v. *United States,* 220 U.S. 338.

In *O'Brien* v. *United States*,[78] the question was raised as to whether or not a conviction under 26 U. S. C. A. 2146(b), defining as a felony the willful attempt to evade the payment of income taxes, should not be reversed when it appeared that defendant also was charged and convicted under 26 U. S. C. A. 2146(a) which made the willful failure to pay the tax, make a return, keep records or supply information a misdemeanor. Although the majority opinion sustained the conviction, a dissenting opinion by Judge Alschuler included the following passage:[79]

> "I cannot bring myself to believe that it was the intent of Congress by paragraph (a) to constitute the willful failure (1) to pay, (2) to make return, (3) to keep records, or to supply information, misdemeanors subject to the prescribed penalties, and then by paragraph (b) to make the very same failures, without the remotest additional element, felonies subject to the larger penalties as therein specified."

This dissenting opinion was cited with approval by Judge Learned Hand of the Second Circuit in *United States* v. *Spies*,[80] where, in dealing with the same question, the Court felt constrained to follow the interpretation placed upon the statute by the majority in the *O'Brien* case and previously adopted by the Second Circuit in *United States* v. *Miro*,[81] saying:

> "We all agree that we must continue to construe the section until the Supreme Court decided otherwise; but Judge L. Hand wishes it to appear that as a new matter he would decide otherwise, and would reverse this conviction in accordance with the reasoning of Judge

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[78] 51 F. 2d 193.

[79] Id., p. 199.

[80] 128 F. 2d 743.

[81] 60 F. 2d 58.

> Alschuler's dissent in O'Brien v. United States, supra, which appears to him unanswerable."

Thus, when the Supreme Court did consider the issue in *Spies* v. *United States*,[82] it adopted the view of Judge Alschuler and Hand and stated:[83]

> "A felony may, and frequently does, include lesser offenses in combination either with each other or with other elements. We think it clear that this felony may include one or several of the other offenses against the revenue laws. But it would be unusual and we would not readily assume that Congress by the felony defined in § 145 (b) meant no more that the same derelictions it had just defined in § 145 (a) as a misdemeanor."

Thus, in the instant case, the conviction of petitioner Washington of the felony defined in § 22-1501 upon the apparent interpretation that such conviction required proof of no fact in addition to those necessary for conviction of the misdemeanor prescribed in § 22-1502, would be "unusual" and contrary to the assumed intent of Congress. Therefore, the court below erred in affirming the trial court's refusal to grant Washington's motion for judgment of acquittal on Count 1 in the indictment.

The Government's case to prove a lottery rested solely on the statutory presumption of a prima facie case, springing from the possession of the contraband articles, as indicated in 22 D.C. Code § 1501 (1951).

The testimony of the Government, taken in its most favorable light, reveals that the petitioners, other than Washington,[84] were present in the premises in which the gaming paraphernalia was found by the officers. No evidence was adduced connecting the petitioners with the premises itself

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[82] 317 U.S. 492.

[83] Id., p. 497.

[84] Washington's situation is treated separately, *supra*.

as their living quarters, as tenants or owners; similarly there was no evidence which connected any one of the petitioners with the gaming paraphernalia located in the room in any wise.[85] It does appear that when the officers arrived no one of the petitioners was physically present in the room in which the "numbers slips, adding machines and cash" were located. There was no suggestion in the evidence that any of the petitioners here concerned exercised any dominion, control or exhibited any interest in any of said articles, nor was there evidence that any of petitioners owned or used any of said paraphernalia.

Beyond the above proof, there was entirely lacking the criterion of the receipt of bets, gaming activity or participation in the actual operation of a lottery.[86] There was no prior observation of these petitioners as occupants of, or visitors to, the suspected premises, nor was their identity even known prior to their arrest.[87]

Constructive proof of possession is not a favored formula upon which to base such a statutory presumption of criminality.[88] Indeed, in circumstances more highly incriminating than the case at bar, Mr. Justice Minton, then a Circuit Judge of the Seventh Circuit, in *United States* v. *Wainer*,[89] says concerning proof of this key fact of possession:[90]

> "To 'possess' means to have actual control, care and management of, not a passing control, fleeting and shadowy in its nature."

Here there is no evidentiary background that any of the petitioners save one had ever been in the premises prior to

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[85] Cf. *Adams* v. *New York*, 192 U.S. 585; *Billeci* v. *U.S.*, — U.S. App. D.C. —, 184 F. (2d) 394.

[86] *Beard* v. *U.S.*, 65 U.S. App. D.C. 231, 82 F. 2d 837.

[87] *Coupe* v. *U.S.*, 72 U.S. App. D.C. 86, 113 F. 2d 145.

[88] *U.S.* v. *Russo*, 123 F. 2d 420.

[89] 170 F. 2d 603.

[90] Id., p. 606.

the occasion of their arrest; no evidence they had ever handled, had any interest in or control over the contraband gaming exhibits. Indeed, nothing was ever adduced upon which the jury might base a conclusion of possession except as it might find from petitioners' mere presence in the place searched or some contiguous apartment annexed thereto, a suspicion of possession. The conclusion of the now Mr. Justice Minton in the *Wainer* case, *supra*, is equally applicable here when he says at the conclusion of that case:[91]

> "We cannot say that the defendant should go to prison on suspicion, even though it were a robust suspicion which this is not."

Similarly, in *United States* v. *O'Brien*,[92] when considering a situation in which there was only presence but no control or dominion over the article the possession of which would give rise to the statutory presumption of guilt, the Court says:[93]

> "If Keating is guilty, the most that can be said of O'Brien is that he was associating with a guilty man."

So, in the case at bar, without the factor of control or dominion over the articles, no presumption arises to supply evidence which the testimony otherwise entirely lacks.

It is the contention of your petitioners that there is an entire failure of proof that they were engaged in a lottery because there is a failure of proof that they were in possession of any of the gaming paraphernalia introduced into evidence over their objection. Your petitioners earnestly suggest that the familiar rule which permits a statutory presumption to supply prima facie evidence on proof of a key or provocative fact has no application when such key or

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[91] Id.

[92] 174 F. 2d 341.

[93] Id., p. 345.

provocative fact itself is inferred upon suspicious circumstance alone. The error is made more distressing by examining the testimony in the light of the presumptions which attend every defendant on trial. The presumption of innocence attends him at every step of the trial. It is the duty of the Government to rebut that presumption by the introduction of evidence making a prima facie case. When the conduct of a defendant is such that there is no direct evidence that he is in possession of the damning contraband and the Government must depend on inferences to be drawn to establish such possession, it is implicit that such evidence must exclude the hypothesis of innocence. It attends the weighing of the proof at every step, and unless the circumstantial evidence points unerringly to and is uniformly consistent with guilt, each defendant is entitled to the contrary presumption of innocence. Where the Government must depend on circumstantial evidence for conviction, it is hornbook that the circumstances must be proven directly. Here, there is no direct evidence of possession, but mere suspicion of possession arising from the fact of physical proximity to the room in which contraband is found. There is no overriding testimonial necessity that their presence alone put them in constructive possession; certainly no basis in the evidence exists which would relegate them to the category of operators or players, rather than wellwishers or visitors.

Of course, when this matter, with its poverty of proof, is left to a jury with the general and usual instructions it virtually amounts to giving the jury a roving commission to find guilt from conjecture. Such a procedure is erroneous and a virtual denial of a trial upon evidence. However robust the suspicion which may have attended the circumstance of their arrest, petitioners' presence alone in proximity to, but without control, management of or interest in the gaming paraphernalia cannot waive the necessity of a

finding of possession, without dispensing with every semblance of due process.[94]

Your petitioners say that the Government's proof does not have the stature of dignity of circumstantial evidence and in essence is an attempt to found a presumption on an inference.

Conclusion

Petitioners respectfully urge, for the reasons and upon the authorities hereinabove discussed, that the granting by this Honorable Court of a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review its decision herein is warranted.

Respectfully submitted,

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Washington 1, D. C.

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[94] Cf. *Roma* v. *U.S.*, 53 F. 2d 1007 (CCA 7th).

APPENDIX A

COMPARATIVE CHART OF BASIC FACTS CONSTITUTING PROBABLE CAUSE

IN

CARROLL v. UNITED STATES, 267 U.S. 132 (as set forth in *Brinegar* v. *United States*, 338 U.S. 160, 164-165)	BRINEGAR v. UNITED STATES, 338 U. S. 160, 162-165	WASHINGTON, ET AL. v. UNITED STATES, (R. 84)
". . . About three months before the search the two defendants and another man called on two of the agents at an apartment in Grand Rapids and, unaware that they were dealing with federal agents, agreed to sell one of the agents three cases of liquor. Both agents noticed the Oldsmobile roadster in which the three men came to the apartment and its license number. Presumably because the official capacity of the proposed purchaser was suspected by the defendants, the liquor was never delivered. "About a week later the same two agents, while patrolling the road between Grand Rapids and Detroit on the lookout for violations of the National Prohibition Act, were passed by the defendants, who were proceeding in a direction from Grand Rapids toward Detroit in the same	". . . At about six o'clock on the evening of March 3, 1947, Malsed, an investigator of the Alcohol Tax Unit, and Creehan, a special investigator, were parked in a car beside a highway near the Inapaw Bridge in northeastern Oklahoma. The point was about five miles west of the Missouri-Oklahoma line. Brinegar drove past headed west in his Ford coupe. Malsed had arrested him about five months earlier for illegally transporting liquor; had seen him loading liquor into a car or truck in Joplin, Missouri, on at least two occasions during the preceding six months; and knew him to have a reputation for hauling liquor. As Brinegar passed, Malsed recognized both him and the Ford. He told Creehan, who was driving the officer's car, that Brinegar was the driver of the passing car. Both agents later testified that	"The search warrant here issued on a police officers' affidavit. It shows that he received information 'from a source which in the past has proved reliable' of a numbers business being conducted over certain telephones; that he investigated and found those phones listed for the premises named; that he received information, from the same source, that these premises were the headquarters of Washington known as 'Wash,' and one Grear; and that he knew these men as numbers operators. The officer also swore that on four successive days and on two occasions thereafter, he telephoned these premises, asked such purely technical questions as, 'Do you have the first number yet?' and 'What do you have for the first one?' and received in response numbers which he later verified to be the 'numbers' of the day. During two of these tele-

Oldsmobile roadster. The agents followed the defendants for some distance but lost trace of them. Still later, on the occasion of the search, while the officers were patrolling the same highway, they met and passed the defendants, who were in the same roadster, going in a direction from Detroit toward Grand Rapids. Recognizing the defendants, the agents turned around, pursued them stopped them about sixteen miles outside Grand Rapids, searched their car and seized the liquor it carried.

"This Court ruled that the information held by the agents, together with the judicially noticed fact that Detroit was 'one of the most active centers for introducing illegally into this country spirituous liquors for distribution into the interior' (267 U.S. at 160), constituted probable cause for the search."

the car, but not especially its rear end, appeared to be 'heavily loaded' and 'weighted with something.' Brinegar increased his speed as he passed the officers. They gave chase. After pursuing him for about a mile at top speed, they gained on him as his car skidded on a curve, sounded their siren, overtook him, and crowded his car to the side of the road by pulling across in front of it. The highway was one leading from Joplin, Missouri toward Vinita, Oklahoma, Brinegar's home.

"As the agents got out of their car and walked back toward petitioner, Malsed said, 'Hello, Brinegar, how much liquor have you got in the car?' or 'How much liquor have you got in the car this time?' Petitioner replied, 'Not too much,' or 'Not so much.' After further questioning, he admitted that he had twelve cases in the car. Malsed testified that one case, which was on the front seat, was visible from outside the car, but petitioner testified that it was covered by a lap robe. Twelve more cases were found under and behind the front seat. The agents then placed Brinegar under arrest and seized the liquor."

phone conversations, he asked to speak to 'Wash' and each time someone answering to that name was summoned to the telephone. We agree with the trial court that these circumstances provide sufficient probable cause to sustain issuance of the warrant.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11372

ROBERT C. SIMMONS, Appellant

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

Decided March 6, 1953

Messrs. T. Emmett McKenzie, James K. Hughes and Domenic Tesauro submitted on the brief, for appellant.

Messrs. Charles M. Irelan, United States Attorney, Martin J. McNamara, and William J. Peck, Assistant United States Attorneys, submitted on the brief, for appellee. Messrs. William R. Glendon and William E. Kirk, Jr., Assistant United States Attorneys, entered their appearances for the appellee. Mr. Joseph M. Howard, Assistant United States Attorney at the time the record was filed, also entered his appearance for appellee.

Before Bazelon, Fahy and Washington, Circuit Judges

BAZELON, *Circuit Judge:*

A jury trial culminated in appellant's conviction on two counts of an indictment charging promotion of a numbers game in violation of 22 D. C. Code § 1501 (1951), and possession of numbers slips in violation of 22 D. C. Code § 1502 (1951). Two grounds for reversal are raised on this appeal.

First, it is urged that the trial court erred in denying appellant's motion to suppress certain crucial evidence obtained incident to his arrest without a warrant. The

motion charged that such evidence was inadmissible since no probable cause existed for making the arrest. Our decisions in *DeBruhl* v. *United States*,[1] and *Mills* v. *United States*[2] make clear that the trial court was correct in finding sufficient probable cause for a warrant-less arrest in the closely similar circumstances of the present case. Hence the motion to suppress was properly denied.

Second, it is urged that error occurred when the trial court elicited testimony before the jury from three police officer witnesses concerning their experience in the investigation of the numbers game. The sole ground for charging error is that testimony relating to offenses "committed by persons entirely disconnected with the [accused]" is inadmissible. That ground is untenable for we know of no rule of evidence, and appellant points to none,[3] requiring the exclusion of such testimony, if it is otherwise admissible.

We think, however, that the admission of this testimony was error for a reason not called to our attention. And since it affected substantial rights of the appellant, we exercise our authority under Rule 52(b) to take note of it.[4] Such error stemmed from defense counsel's renewal of the motion to suppress during the trial.[5] In support of that motion, he was allowed over objection to elicit a mass of testimony before the jury on the issue of probable cause

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[1] — U.S. App. D.C. —, 199 F.2d 175, *cert. denied*, 344 U.S. 868 (1952).

[2] 90 U.S. App. D.C. 365, 196 F.2d 600, *cert. denied*, 344 U.S. 826 (1952).

[3] The cases which appellant cites involve a rule of evidence which applies only to other offenses *committed by the accused* and not to offenses committed by persons other than the accused. See, *e.g.*, *Bracey* v. *United States*, 79 U.S. App. D.C. 23, 142 F.2d 85, *cert. denied*, 322 U.S. 762 (1944); *Boyer* v. *United States*, 76 U.S. App. D.C. 397, 132 F. 2d 12 (1942).

[4] Rule 52(b) of the Federal Rules of Criminal Procedure provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." *See Tatum* v. *United States*, 88 U.S. App. D.C. 386, 388, 190 F.2d 612, 614 (1951); *Robertson* v. *United States*, 84 U.S. App. D.C. 185, 186, 171 F.2d 345, 346 (1948); and *see Braswell* v. *United States*, 200 F.2d 597 (5th Cir. 1952).

[5] Record, p. 30; and see notes 1 and 2, and text, *supra*.

for appellant's arrest [6]—a matter solely for determination by the court. [7] It was in this context that the court on its own initiative elicited the testimony in question before the jury. [8]

It cannot now be said that the admission of much of this testimony constituted harmless error since it might have been admitted as expert testimony on the patterns of conduct characteristic of a numbers operation. [9] It was not introduced for that purpose and thus not so limited. In any event, some of the testimony, such as the following, would not be admissible before a jury under any circumstances:

> "The Court [to Detective Molle of the vice squad]: Did the information you got from Krenitsky and Maurer [police officers who kept appellant under surveillance for a period of several days prior to the arrest] fit the pattern which you in your experience knew, if you did know, of number operations?
>
> "The Witness: The same places each day * * *. *my knowledge of how numbers men operated.*" [10]

and

> "The Court [to arresting Officer Valentine]: Had either Krenitsky or Maurer told you prior to your going out there that day, what Simmons [appellant]

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[6] Record, pp. 30, 48, 59, 101, 102, 107-9; and see pp. 89, 90, 96.

[7] The issue of probable cause for an arrest may be a question for the jury in a *civil suit* for false arrest if, as is true of any other pertinent issue, the facts are in dispute. *Maghan* v. *Jerome*, 67 App. D.C. 9, 10, 88 F. 2d 1001, 1002 (1937); *and see Brown* v. *Selfridge*, 224 U.S. 189, 193 (1912) (malicious prosecution). But clearly that proposition has no application in a criminal case where for example, as here, the issue of probable cause arises on a motion to suppress evidence which may be heard before trial. *Newyahr* v. *United States*, 85 U.S. App. D.C. 384, 385, 177 F. 2d 658, 659 (1949), *cert. denied*, 338 U.S. 936 (1950), is not to the contrary.

[8] Record, pp. 36-8, 87-9, 102-6.

[9] *See Guy* v. *United States*, 71 App. D.C. 89, 92, 107 F.2d 288, 291, *cert. denied*, 308 U.S. 618 (1939); *Wagstaff* v. *United States*, — U.S. App. D.C. —, 198 F. 2d 955 (1952), *cert. denied*, 21 U.S.L. WEEK 3196 (Jan. 20, 1953).

[10] Record, p. 88 (emphasis supplied).

had been doing each day they had him under surveillance?

"The Witness: Yes, Sir.

"The Court: What did they tell you?

"The Witness: They told us that he was going to these different addresses—I don't know—I remember there was four or five different addresses that he would go to.

"The Court: The same places each day?

"The Witness: The same places each day * * *. And we knew, I mean within my own knowledge, *I knew the he [appellant] was participating in the operation of a lottery.*

"The Court: You thought so?

"The Witness: I had reasonable grounds to believe that it was, without evidence." [11]

That testimony, particularly the italicized portions, prejudiced appellant by substantially affecting his right to trial by jury. Such opinion evidence trenched upon the jury's duty to determine the ultimate question raised by count one, *i.e.*, whether appellant was operating a numbers game in violation of 22 D. C. Code § 1501. It was for the jury, not for the witnesses, to measure evidence on appellant's conduct against evidence on the pattern of conduct characteristic of a numbers operator and upon that basis to determine guilt or innocence. [12]

This error was aggravated when the court instructed the jury that:

"* * * you must determine in this case as a matter of fact * * * whether or not these officers had a reasonable cause to believe that a felony or a misdemeanor was being committed in their presence * * *.[13]

* * * * * * *

"That is the question of fact in this case, and the only one that I see, for you to decide. If you believe

[11] *Id.* at 104-5 (emphasis supplied).

[12] *Henkel* v. *Varner*, 78 U.S. App. D.C. 197, 198, 138 F. 2d 934, 935 (1943), and cases cited therein.

[13] Record, p. 131.

that they had reasonable cause to believe that there was a numbers operation being conducted over this period of time, under the observation of these officers, then they had a right to arrest, and if you believe that the material which was obtained as a result of the arrest came from the defendants and, of course, that is not denied—then the case is made. If you have a reasonable doubt about it, the case is not made. [14]

* * * * * * *

"* * * If the police officers had reasonable ground to believe that this was a numbers operation, they had a right to arrest, and if they found what they say they found, that establishes that count." [15]

This language furthered the erroneous notion that the issue of probable cause on the renewed motion to suppress was for the jury to decide. Moreover, it may well have created the impression on the minds of the jury that guilt was to be equated with the existence of probable cause for appellant's arrest. That too was error since it might have led the jury to mistake the quantum of evidence necessary to support an arrest for the much greater quantum necessary to support a verdict of guilty. Thus a final link was forged which prevents escape from the conclusion that the record as a whole discloses plain error which substantially affected the rights of appellant.

Accordingly the conviction on count one is reversed and remanded for a new trial.

The errors discussed above did not touch the ultimate question raised by count two, *i.e.*, whether appellant possessed numbers slips in violation of 22 D. C. Code § 1502. Therefore the conviction on that count is not disturbed. But since the judgment imposed a sentence greater than that permitted by 22 D. C. Code § 1502, we remand for sentence in accordance with the statute.

Reversed and remanded for proceedings in conformity with this opinion.

[14] *Id.* at 133-4.

[15] *Id.* at 137.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 671

OTHELLO WASHINGTON, RALPH W. MCKNIGHT, LORETTA J. WALLACE, CHARLES F. KING, JAMES H. TURNER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 82-84) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered January 15, 1953 (R. 85), and a petition for rehearing was denied on February 5, 1953 (R. 101).

On March 4, 1953, the Chief Justice extended the time for filing a petition for a writ of certiorari until March 21, 1953 (R. 102), and the petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether there was a sufficient showing of probable cause for issuing the search warrant.

2. Whether testimony of an expert witness, that the articles found were the kind normally used at numbers headquarters, was improper opinion evidence on the ultimate fact to be determined by the jury.

3. Whether the evidence was sufficient to sustain the convictions.

STATUTES AND RULE INVOLVED

The pertinent sections of Title 22 of the District of Columbia Code are:

> § 1501. If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly

known as policy lottery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than $1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery.

§ 1502. If any person shall within the District have in his possession, knowingly, any ticket, certificate, bill, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for the purpose of playing, carrying on, or conducting any lottery, or the game or device commonly known as policy lottery or policy, he shall be fined upon conviction of each said offense not more than $500 or be imprisoned for not more than six months, or both.

Rule 41 (e), Federal Rules of Criminal Procedure, provides:

Motion for Return of Property and to Suppress Evidence.—A person aggrieved by an unlawful search and seizure may move the dis-

trict court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT

On June 4, 1951, a four-count indictment was filed in the District Court for the District of Columbia, charging petitioners in the respective counts with (1) managing, carrying on and promoting a numbers game in violation of 22 D. C. Code (1951), § 1501, *supra* pp. 2-3, (2) possession of numbers slips in violation of 22 D. C. Code (1951) § 1502, *supra,* pp. 3-4, (3) operating a gaming table for betting on horse races, in violation of 22 D. C. Code

(1951), § 1504, and (4) operating a gaming place for betting on horse races, in violation of 22 D. C. Code (1951), § 1504 (R. 15-16). After a jury trial, petitioner Washington was found guilty on the first and second counts and the other petitioners on the first count. A general sentence of six to 18 months' imprisonment was imposed on Washington (R. 32). Petitioners McKnight and King were sentenced to five to 15 months' and three to nine months' imprisonment respectively (R. 34, 36). The other two petitioners, Wallace and Turner, were each sentenced to imprisonment for four months to a year and a day, but execution of the sentences was suspended and they were placed on probation (R. 35, 37). On appeal, the judgments were affirmed by the Court of Appeals for the District of Columbia (Bazelon, Fahy and Washington, JJ.) (R. 82-84).

Prior to trial, each of the petitioners filed a motion to suppress the evidence seized by police officers on April 11, 1951, under authority of search warrants, from a duplex building located at 735 and 735A Rock Creek Church Road, N.W., Washington, D. C. (R. 18-27). These motions alleged that the search warrants had been issued without a sufficient showing of probable cause. None of the petitioners claimed ownership or possession of the seized property or asked for its return, although Washington claimed possession of the premises where it was seized.

The warrants were issued by the United States Commissioner on affidavit of Mr. Arthur H. Molle,

a District of Columbia police detective, alleging the following facts:

An informant, who had in the past proved reliable, told Molle that the Rock Creek Church Road premises was the numbers headquarters of petitioner Washington, known as "Wash," and one Jesse Grear, and that they were conducting a lottery over two telephones (Nos. TU. 4840 and RA. 3699) located there. A check revealed that these two telephones were listed at that house. Both Washington and Grear were well known to Molle and other police officers as numbers operators, having been arrested in the past on such charges. Molle called the telephone numbers on nine occasions during a period of over a week just prior to obtaining the search warrant. On seven of those occasions he asked for the "number" for that day and, in response, was given a number which proved to be that day's lottery number. On the other two occasions he asked to speak to "Wash." The person who answered the phone said, "Wash, you're wanted on the phone." On one of these occasions Molle hung up before "Wash" came to the phone, and on the other he covered the mouth piece and heard a voice say "hello" three or four times and "It's gone dead." (R. 8-9.)

The motions to suppress the evidence of the seized property were denied (R. 28).

The evidence adduced at the trial disclosed the facts contained in Officer Molle's affidavit (R. 40-43, 63-65, 71-72). Further, Molle testified at the

trial that on two occasions the phone was answered by a woman, once just a few minutes prior to the time the officers executed the search warrant on April 11, 1951 (R. 61).

The evidence adduced at the trial further showed the following: Having secured the search warrant, Officer Molle and five other officers went to the Rock Creek Church Road premises at about 3:00 P.M., April 11, 1951 (R. 43). The police officers surrounded the building (R. 70), Molle and two others going to the 735A entrance (R. 43-44). They rang the door bell and knocked. They received no response, although they heard sounds of many footsteps on the second floor. Officer Molle then forced the door open and entered a vestibule, at the end of which was a second locked door (R. 44-45, 66).

Officer Molle started to break the door open, whereupon petitioner Washington called out that he would open it (R. 45). When Washington opened the door, he was asked where his office was located. Receiving no response, the officers threatened to break open a locked door leading to a first floor room, whereupon Washington told them that, "The stuff is upstairs" (R. 46).

The unlocked upstairs room contained several tables on which were four adding machines, the two telephones (Nos. TU. 4840 and RA. 3699), a large quantity of numbers slips, a scratch sheet, some run-down tape, and a large amount of money (R. 14, 46, 50-55, 75). Boxes on the floor and in a closet in the room contained numbers slips,

money, scratch pads, paper clips, coin wrappers, and brown manila envelopes (R. 52-55) [1].

Coats belonging to petitioners McKnight and Turner were lying on the floor of the room (R. 57-59). McKnight's coat contained two run-down tapes (R. 57) and Turner's contained $39 in change (R. 59).

While the officers were in the room, a period of one-half hour, the telephone rang about every 15 seconds (R. 59-60).

As Officer Molle and others were entering the house from the front, Officer Valentine was at the rear of the house. He ascended some steps to a second floor porch landing (R. 73). When the officers knocked at the front door, petitioners McKnight, King and Turner approached the rear door on this landing, but when they saw Officer Valentine they stopped and went into the second floor kitchen (R. 67, 73, 75). Petitioner Wallace was found hiding in a closet off the kitchen (R. 73-74).

On petitioner Washington's person the police found various papers containing lists of names with amounts of money alongside, adding machine paper containing numbers, names and amounts of money, and a large amount of money (R. 49-50). A total of $1999.97 was found on Washington's person and on the table (R. 50). He claimed the money on the table as belonging to him (R. 50, 61).

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[1] All of these items, as well as pictures of the room, were introduced in evidence (R. 39, 47, 63). Officer Molle, who qualified as an expert witness as to the numbers business, testified that such articles are normally found in a numbers headquarters (R. 53, 56).

ARGUMENT

1. Petitioners' principal contention, that the search warrant was issued without a sufficient showing of probable cause (Pet. 17-32), is wholly devoid of merit. It is well settled that probable cause for issuing a search warrant is less than proof of guilt, and that all the facts upon which the affiant bases his belief that an offense is being committed need not be legally admissible evidence at a trial. *Dumbra* v. *United States*, 268 U.S. 435; *Steele* v. *United States No. 1*, 267 U.S. 498; cf. *Brinegar* v. *United States*, 338 U.S. 160; *Carroll* v. *United States*, 267 U.S. 132.

Probable cause for issuing a search warrant is shown if "the affiant had reasonable grounds at the time of his affidavit and the issuance of the warrant for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged" (*Dumbra* v. *United States*, *supra*, at 441). "Probable cause has been defined by this Court as 'reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged' " (*ibid.*).

Officer Molle's affidavit showed that he had received information from a reliable informant that two notorious numbers operators were conducting a numbers business from a specified building over two specified telephones. Officer Molle cautiously

and fully checked this information by the only available method. He not only ascertained that the telephones were located in that building, but by calling the telephone numbers on nine occasions over a period of more than a week, he received convincing first-hand information that a numbers business was being conducted in that building, and that petitioner Washington was one of the individuals operating the lottery.

As both courts below held, this information in Officer Molle's possession was more than enough to convince any cautious person that an offense was being committed in the building of which the warrant authorized a search. [2]

2. Petitioners also contend that the admission of testimony by Officer Molle, who qualified as an expert witness on the numbers business, that he found numbers slips and other gambling paraphernalia in the second floor room, and that adding machines, paper clips, staplers, envelopes and scratch pads, are articles normally found in a numbers headquarters, was prejudicial error (Pet. 37-43). Their argument is that this testimony invaded the province of the jury in that it was opinion evidence on the ultimate fact to be determined by the jury. This contention is likewise without merit.

Petitioners were convicted of managing, carrying on and promoting a numbers lottery (Count I,

[2] Since it is clear that the search under the warrant was proper, the issue raised by petitioners other than Washington as to their standing to challenge its validity or their right to reversal if the evidence were suppressed as to Washington, (Pet. 32-37) is not presented by this case.

R. 15).[3] The ultimate fact for the determination of the jury was not whether the property found in the numbers headquarters was equipment normally used in numbers operations, but rather whether petitioners were carrying on a numbers lottery. Manifestly, in most cases involving contraband or an illegal venture, the contraband or property used in the illegal enterprise must be identified by an expert, for law-abiding citizens are not familiar with such matters.[4] Testimony as to the identity or normal use of such articles does not invade the province of the jury, which is to determine the ultimate fact as to whether the defendant has committed an illegal act. Cf. *United States* v. *Johnson*, 319 U.S. 503, 519; *Hopt* v. *Utah*, 120 U.S. 430, 436-439; *United States* v. *Cox*, 147 F. 2d 587, 588 (C.A. 7), certiorari denied, 325 U.S. 858.[5]

3. Petitioners' last contention is that the evi-

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[3] Although petitioner Washington was also convicted on the second count of possessing papers used to carry on a numbers lottery, the validity of that conviction is not at issue here, since not only was he given a general sentence, but the sentence actually imposed was in excess of the permissible sentence for the Count II offense. See Section 1502, *supra*, pp. 3-4.

[4] See, e.g., *Brown* v. *United States*, 61 F. 2d 363 (C.A. 8); *Gorat* v. *United States*, 61 F. 2d 397 (C.A. 8); *Kennedy* v. *United States*, 4 F. 2d 488 (C.A. 9).

[5] In *Simmons* v. *United States*, decided March 6, 1953 (C.A.D.C.) (Pet. 58-62, Appendix B), relied on by petitioners, the police officer testified that from observing the defendant's conduct while the police officers had him under surveillance, and in view of his own "knowledge of how numbers men operated," the witness "knew the [defendant] was participating in the operation of a lottery." This case was decided by precisely the same panel which decided the instant case and obviously presents no support for petitioners' contentions.

dence was insufficient to sustain their convictions (Pet. 43-55). But on the evidence of record the jury was clearly warranted in finding the petitioners guilty. The evidence established that a lottery of large proportions was being conducted in the second floor room. Two telephones which rang every 15 seconds, four adding machines, and the other necessary work in connection with such a numbers business, clearly required the work of several persons. It is manifest that the lottery was in operation when the police began the raid. For not only did the police officers telephone the premises just before beginning the raid and receive an answer concerning the lottery, but the many hurried footsteps on the second floor when the raid began, the general appearance of the room, with large amounts of money lying on the table, and the constant ringing of the telephones just after the officers arrived, showed that actual numbers operations had been recently and quickly terminated.

It was also clear that petitioner Washington was in charge of the numbers operations. When the police arrived and it became apparent that they intended to break in, he informed them that, "The stuff is upstairs." There he claimed ownership of the large amount of money which was lying on the table, obviously used in the numbers operations. The police also found papers used in the lottery on Washington's person, as well as a large amount of money.

The evidence also showed that the other peti-

tioners were assisting in operating the lottery. As stated, the numbers operations carried on in the second floor room, which required the services of several persons, were terminated just as the police officers were entering the building. Moreover, the telephone calls by the police prior to the raid revealed that others than Washington were engaged in the operations, including a woman. As the officers were entering, they heard many hurried footsteps on the second floor. Only petitioners were found in the building—on the second floor attempting to escape or to hide. McKnight's and Turner's coats were found in the numbers headquarters, each containing articles used in the lottery.

These facts, not otherwise explained (petitioners offered no evidence), were ample to show their participation in the illegal venture. Cf. *Butler* v. *United States*, 197 F. 2d 561 (C.A. 10); *Battjes* v. *United States*, 172 F. 2d 1 (C.A. 6); *United States* v. *Cohen*, 145 F. 2d 82 (C.A. 2), certiorari denied, 323 U.S. 799; *Beard* v. *United States*, 82 F. 2d 837 (C.A.D.C.), certiorari denied, 298 U.S. 655.

CONCLUSION

The decision below is correct, and the case presents no conflict of decisions. We respectfully submit that the petition for a writ of certiorari should be denied.

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